FILED
NOV 8 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 562

BEN PRESTON, *Petitioner,*

v.

KAW PIPE LINE COMPANY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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November 8, 1940.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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(k) Respondents had actual notice of Petitioner's claim and title to the property involved, and had a demand for delivery of the leases covering said lands; the escrow agreement and the assignment thereof to the Petitioner were recorded, thereby providing constructive notice to Respondents of Petitioner's claim and title; and the Respondent oil companies took top-leases upon said lands, with both actual and record notice of the Petitioner's claims and rights 92

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

BEN PRESTON, *Petitioner*,

v.

KAW PIPE LINE COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

This petition of Ben Preston, Petitioner, respectfully shows to this Honorable Court:

(A) SUMMARY, CHRONOLOGICAL, STATEMENT OF THE MATTER INVOLVED.

This is a case where powerful, rich interests, who the Petitioner contends have a reputation for ruthlessness, have ganged up on a "little man," and have raided his rights, in absolute contempt of law and equity.

It is a proceeding involving certain gas and oil lands in Kansas worth millions of dollars. It is a case in which the

Respondents are comprised, in most part, of (a) a defaulting escrow-holder of oil and gas leases, to the delivery of which the Petitioner is entitled, but which have been withheld from him wrongfully, covering said lands, (b) of the original owners of said lands, who have conspired with the defaulting escrow leaseholder to flout the rights of the Petitioner and to deprive him of his just title to said lands, and (c) of rich and powerful oil companies who, as top-lessees, have seized, and now hold, said lands, and have produced, and now produce and retain, gas and oil therefrom for their own benefit and behoof.

This is a proceeding in which the Petitioner contends that the procedure of the lower Federal courts has been capricious, arbitrary, unlawful, and censurable; and that the decisions of those courts herein are biased, that they misinterpret or ignore the salient facts of record, which have been admitted by the Respondents, and that they defy the long-established principles of both law and equity.

This is a case in which the wronged and injured Petitioner has never been permitted to go to trial, because the Respondents possess no valid defense; therefore, the issues raised in this proceeding have never been heard on their merits, but the decisions of the lower Federal courts have hinged on technical defenses interposed by the Respondents.

If there ever was a proceeding presented to this Honorable Court where justice cries out for recognition, and where this Honorable Court should interpose its beneficent supervision, and should invoke and exercise its paramount powers, to right an unconscionable wrong, this is it.

The opinion (R. 61-65) and judgments (R. 65, 86) of the United States Circuit Court of Appeals, Tenth Circuit, sought to be reviewed, affirmed the final judgment (R. 46) of the District Court of the United States for the District of Kansas, dismissing the Petitioner's bill of complaint against some 208 defendants, most of whom are residents of Russell County, Kansas, in which oil and gas properties involved are located, and denied a rehearing to the Petitioner. (R. 86) The complaint, and the exhibits annexed

thereto and made a part thereof, are contained in the printed record. (R. 5-24)

The issues raised by the bill of complaint have never been tried upon their merits. The final judgment of the District Court, and the opinion and judgment of the Circuit Court, are all addressed to a motion to dismiss the complaint filed by the Respondents herein.

The relief prayed for by the Petitioner in his bill of complaint, filed in the District Court, is outlined as follows in the complaint:

> "Wherefore, plaintiff prays that he be judged to be the equitable owner of oil and gas rights on all of said leases on all of said real estate described herein, and with all of the rights and privileges given him in the original leases to be executed by said lessors, as of this date, and that the said original lessors or their predecessors in title be required to execute new oil and gas leases and deliver the same to the plaintiff with the full power to enter upon, explore, and develop said properties for oil and gas purposes, and that he have judgment for possession of said properties with the right to enter upon, explore and develop the same for oil and gas; and that the defendants holding oil and gas leases upon any or all of said property be judged to be trustees for this plaintiff on all of the oil and gas rights which they claim to have under and by virtue of any oil and gas leases; and that this plaintiff be substituted as lessee as to any and all of said leases, and that the said defendants who have produced and sold from any of said premises, oil and gas, be required to account for all of said oil so run and sold from said premises, and that a receiver be appointed by this Honorable Court to look after and preserve the properties during the pendency of this litigation, and for all other equitable and just relief." (R. 15, 16)

The motion filed by the Respondents to dismiss Petitioner's complaint in the United States District Court is tantamount to a demurrer to the complaint and admits the facts which are pleaded in the original bill of complaint (*Holland* v. *Majestic Radio and Television Corp.*, 27 Fed. Supp. 990;

Schindler v. *Spackman,* 16 Fed. (2d) 45), appearing on pages 5 to 21 of the record herein.

Therefore, the Respondents admit all the facts alleged in the complaint, including the outstanding facts enumerated below:

(I) That the subject matter of this cause is located in the First District of Kansas, and that prior to June 24, 1921, the landowner Respondents executed oil and gas leases to the Focks Drilling and Manufacturing Corporation, assignor of the lessee Petitioner, and that said leases and an escrow agreement were executed and placed in the Bunker Hill State Bank, Bunker Hill, Kansas, with M. K. Mathews, its Cashier.

(II) That, according to the escrow agreement, the lessee Petitioner was to commence the drilling of a well upon a portion of the acreage involved in this controversy; that the leases and escrow agreement were transferred to the Petitioner by the Focks Drilling and Manufacturing Corporation, said assignment being recorded in Book 8, at page 153, of the Records of the Register of Deeds of Russell County, Kansas, where the land involved herein is located.

(III) That an extension agreement was entered into on September 21, 1922, extending the time to begin drilling operations for a period of two years after that date; that the escrow agreement was placed of record in the office of the Register of Deeds of Russell County, Kansas, and recorded in Book 5, at page 142.

(IV) That, in accordance with the escrow agreement and the extension thereof, Petitioner erected a derrick upon the block of leases and within a radius of ten miles of all land located in the block on May 14, 1924; that under the terms of the escrow agreement, the bank as the escrow holder, was bound to deliver the leases upon commencement of the well; and that when the well was spudded in Petitioner demanded the leases from the bank, which it refused to deliver to him.

(V) That, notwithstanding said refusal, the Petitioner drilled to a depth of approximately 600 feet and was con-

tinuously denied delivery of the leases by the escrow bank; and that said drilling was performed within the period of time of two years covered by the extenson to the escrow agreement.

(VI) That on April 2, 1924 the Respondent escrow-bank filed a suit in the District Court of Russell County, Kansas, which cause was transferred to the District Court of the United States for the District of Kansas, and was by that court dismissed on June 22, 1926, no opinion being reported; this suit having been commenced about six months before the expiration of the two years which Petitioner had, under the extension agreement, to commence the well; and that the escrow bank through its Cashier, M. K. Mathews, entered into a conspiracy with the Respondent lessor landowners to defeat the Petitioner's rights.

(VII) That the Petitioner has at all times since the execution of said leases and the execution of said escrow agreement, been ready, able and willing to carry out all of the provisions of said leases, said escrow agreement and said extension thereto; and that the Petitioner has been prevented from carrying out the provisions of said instruments by the acts and conduct of the Respondents.

(VIII) That all of the properties described in the complaint have been continuously under lease since the provisions of the escrow agreement and the extension thereto were violated by the Respondents; and that the Respondent lessors clouded the Petitioner's title to said oil and gas leasehold estates and prevented him from compl tion of the drilling operations on said properties; and that since April 21, 1924, until July, 1938, the leasehcld estate has been in continuous litigation.

(IX) That the Respondents had actual notice of the claims and title of the Petitioner, and had record knowledge and actual knowledge of the escrow agreement and the extension agreement, and that the well had been commenced, but that they disregarded the rights of the Petitioner and

took oil and gas leases on said property, and placed them of record and clouded the title of the Petitioner to the same.

A chronological, summary statement of the facts admitted by Respondents in regard to the matter involved, and of the history of the cause, follows:

Date	*Facts*
Prior to June 24, 1921.....	Leases executed to Focks Drilling and Manufacturing Corporation. (R. 8)
June 25, 1921	Escrow agreement entered into between Focks Drilling and Manufacturing Corporation and Bunker Hill State Bank. (R. 20)
"Within 90 days from time block completed".....	Focks to begin drilling operations for test well. (Ex. B, R. 9, 20)
September 21, 1922.....	Extension agreement entered into giving two years' additional time to commence well to September 21, 1924. (R. 10, 21)
December 17, 1923.....	Escrow agreement recorded. (R. 20)
March 4, 1924.....	Escrow agreement assigned to Petitioner. (Ex. C, R. 9, 20)
April 1, 1924	All properties under top leases to various individuals at all times subsequent to this date. (R. 12)
April 2, 1924	Case of *Bunker Hill State Bank* v. *Focks et al.* filed in Kansas State Court. (R. 10) This is first of "continuous litigation" referred to in complaint.

Date	*Facts*
April 21, 1924	"Continuous litigation" started and continued to July 1938. (R. 12)
May 14, 1924	Petitioner erected derrick, placed machinery on leased land, and spudded in well continuing drilling to 600 feet. (R. 10)
"Upon completion of said derrick and spudding in of well"	Petitioner demanded delivery of leases to him and was refused. (R. 10) He demanded leases during time he was drilling well to a depth of 600 feet and his demands were refused at all times. (R. 10)
June 22, 1926	*Bunker Hill State Bank* v. *Focks et al.* dismissed by Federal Court, to which it had been removed from Kansas Court. (R. 11)
July 23, 1926	Assignment Focks to Petitioner recorded. (R. 21)
February 4, 1930	Petitioner served written notice upon all Respondents asserting his claim and title to property involved and demanded delivery of leases covering said property to him. (Ex. E, R. 12, 22, 24)
February 16, 1930	Fixed as time for delivery of leases to Petitioner. (R. 23)
"After actual and record notice of escrow agreement and extension agreement and starting of well by Petitioner"	Respondents took top leases on the property, placed them of record, entered thereon and drilled producing oil wells from which they are now producing large quantities of oil. (R. 14)

Date	*Facts*
July 1938	Last suit involving portion of property dismissed in Supreme Court of Kansas. (R. 12) (The complaint does not list all litigation, only two cases; but it states that "Plaintiff at the proper time will make proof thereof," meaning that a complete line of evidence as to "continuous litigation" would be submitted at the hearing. (R. 11))
December 30, 1938	Petitioner commenced this action in the United States District Court of Kansas. (R. 24)
April 3, 1939	Respondents filed their motion to dismiss, included in which, in the alternative, was a motion to make the complaint more definite. (R. 28)
May 19, 1939	Motion to dismiss presented and argued to the District Court, Honorable Richard J. Hopkins, presiding, and submitted on briefs. (R. 28)
August 7, 1939	District Court entered its order sustaining motion to dismiss the complaint on the grounds that Petitioner's cause of action was barred by laches and the Statute of Limitations of Kansas (R. 31) and dismissed the petition (complaint). An appeal from this order was in due time lodged in the Tenth Circuit Court of Appeals by Petitioner and docketed as Case No. 2022. (R. 31)

Date	*Facts*
April 15, 1940	Oral argument in Circuit Court was had on this appeal, Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable W. A. Huxman, presiding at the hearing. The Court announced that since no appealable order had been entered by the District Court the case would have to be remanded for further proceedings. (R. 37)
April 26, 1940	Petitioner files and presents before the District Court his application for leave to file an amended complaint in this cause. (R. 37-43)
April 26, 1940	After District Court had lost jurisdiction, Judge Hopkins requests of Petitioner that he file a list of all interested parties and "file it entitled in the case in response to the Court's inquiry". (R. 42-43)
May 3, 1940	Petitioner files motion to modify the order requiring this information as to listing those owning an interest in the escrow agreement. (R. 43-46)
May 13, 1940	District Court entered its final judgment dismissing plaintiff's action with prejudice and denied plaintiff's request to file an amended complaint. (R. 46)

Date	*Facts*
May 24, 1940	District Court refused to modify its order requiring a list of assignees of interest in the escrow agreement and again ordered this information filed even though the Court had lost jurisdiction of the case since the Petitioner had previously to this hearing filed his notice of appeal to the Circuit Court in Case No. 2142. (R. 47-53, 57)
May 27, 1940	List of names of interest holders in the escrow agreement filed with the Clerk of District Court. (R. 54-56)
June 27, 1940	Letter written by Robert B. Cartwright, Clerk, United States Circuit Court of Appeals, Tenth Circuit, to Petitioner's counsel requesting deposit of $25.00 to cover printing of supplemental record on appeal in Case No. 2142. (R. 77-78)
June 28, 1940	Second letter from Clerk, United States Circuit Court of Appeals, Tenth Circuit, written to Petitioner's counsel, advising that the Clerk had received and filed the opinion of the Court delivered by Judge Huxman in Case No. 2142 affirming the judgment of the District Court. The second letter was received by counsel before a response could be made to the first letter or an arrangement could be made by him to have the money forwarded. (R. 78)

Date	*Facts*
June 28, 1940	Order of submission and dismissal entered in Case No. 2022 (first appeal) by Circuit Court, which order was entered by Honorable Orie L. Phillips and Honorable Robert E. Lewis, Circuit Judges. Judge Lewis had not participated in the hearing of this appeal on April 15, 1940. (R. 60)
Meanwhile	The second appeal of this case was docketed in the Circuit Court of Appeals as Case No. 2142 within due time.
June 28, 1940	Circuit Court delivers its opinion in Case No. 2142 affirming the decision of the District Court dismissing plaintff's acton and denying him the right to file an amended complaint. (R. 61-65) This decision holding that plaintiff was estopped to assert his claim and the Court rendered judgment accordingly. (R. 64)
July 25, 1940	Petitioner filed his petition for rehearing in Circuit Court. (R. 67-85)
August 9, 1940	Petitioner's petition for rehearing denied. (R. 86)
August 21, 1940	Mandate issued from Circuit Court to District Court. (R. 86)

(B) STATEMENT DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE JUDGMENTS AND DECREES IN QUESTION.

(I). The Statutory Provision Sustaining the Supreme Court's Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 347).

(II) The Dates of the Opinions, Judgments and Orders Sought to be Reviewed, and the Date Upon Which this Petition for Certiorari is Presented.

The filing of this Petition for Certiorari and Brief in support thereof is timely, as it is made within the period prescribed by Section 8(a) of the Act of February 13, 1925 (U. S. C., Title 28, Section 350), and by Rule 38(2) of the Revised Rules of this Honorable Court, effective February 27, 1939.

The date of the order of submission and dismissal entered by the United States Circuit Court of Appeals, Tenth Circuit, in *Case No. 2022*, BEN PRESTON, APPELLANT, v. KAW PIPE LINE COMPANY, ET AL., APPELLEES, to be reviewed by this Honorable Court, is June 28, 1940. (R. 60) That order finds and holds that the order of the United States District Court for the District of Kansas, from which appeal was made, "is not a final appealable order", and that: "It is therefore now here ordered by the court that this cause be and the same is hereby dismissed out of this court at the cost of the Appellant." (R. 60)

The date of the opinion rendered by the United States Circuit Court of Appeals, Tenth Circuit, in *Case No. 2142*, BEN PRESTON, APPELLANT, v. KAW PIPE LINE COMPANY, ET AL., APPELLEES, 113 Fed. (2d) 311, to

be reviewed by this Honorable Court, is June 28, 1940 (R. 61); and said court's order therein was entered on the same date. (R. 65).

On July 25, 1940 (R. 85), a Petition for Rehearing (R. 67-85) was filed in behalf of the Petitioner here, who was the Appellant in said *Case No. 2142, supra,* with the United States Circuit Court of Appeals, Tenth Circuit. The order (R. 86) denying said Petition for Rehearing was entered by said Court on August 9, 1940 (R. 86), which is the date from which the period of three months within which this Petition for Certiorari and Brief in support thereof must be filed in compliance with the provisions of Section 8(a) of the Act of February 13, 1925 (U. S. C., Title 28, Section 350) must be computed.

This Petition for Certiorari and Brief in support thereof, is filed on November 8, 1940.

(C) THE QUESTIONS PRESENTED.

(I) Questions of Law Presented.

(1) Did the Circuit Court err in finding and holding that Petitioner's conduct "effectively estops him from asserting any claim to this property" (R. 64, 65); and is that Court's decision erroneous on the grounds that it is contrary to, and in conflict with, decisions of other Circuit Courts, and of this Honorable Court, on the same matter?

(2) Did the Circuit Court err in failing to find and hold:

(a) That continuous litigation involving title and possession of the property involved has tolled the running of any possible estoppel against the Petitioner?

(b) That, whether or not the character of the pending litigation, clouding the claim and title of the Petitioner to the lands involved, was such as to prevent the Petitioner from asserting his claim and title, is immaterial to the issues in this proceeding?

(c) That no obligation has rested at any time, either in law or in equity, upon the Petitioner to institute court proceedings in order to assert his claim to and title in said lands?

(d) That, under and by virtue of the escrow agreement, the Bunker Hill State Bank was bound and compelled, as a matter of law, as soon as the Petitioner erected a derrick, placed machinery, and spudded a test well, to deliver to the Petitioner the leases covering said lands, which were held in escrow by that bank?

(e) That the leases, placed in escrow with the Bunker Hill State Bank, assignments of which were held by the Petitioner, are superior to all claims, rights, titles, or interests, in and to all of the leases held by the Respondents; and are by them held in trust for the use and benefit of the Petitioner, with the full power of the Petitioner to enter upon and explore said properties for oil and gas?

(f) That the Petitioner has at all times complied, insofar as he has been permitted to do so by the Respondents, with the escrow agreement and with the provisions of the leases covering the lands involved; and that, by virtue of the assignments to him, said Petitioner claims and has an equitable ownership to all of said oil and gas leases, with the full benefit of all the terms thereof, and with the right to proceed with the drilling of wells on said block of land?

(g) That, by reason of the wrongful acts and doings of the Respondent escrow-bank, and of Respondent lessors who placed the leases executed by them covering the property involved in escrow with said bank, and their breach of the terms of their contracts and agreements, said Respondents are estopped, in equity, from denying that the Petitioner became the equitable owner, and is now the owner, of said leases, and are estopped from claiming or asserting that said leases expired by their respective terms, because by reason of the acts and conduct of said Respondent bank and of said Respondent lessors the Petitioner was prevented from further performing his agreement, and was relieved therefrom until the said lessors and bank shall have performed on their part the obligations imposed upon them; and are estopped, also, from denying that the said Petitioner is now entitled to have the full time provided for in said leases for the performance of said agreements and all other obligations devolving upon him after the delivery to him of said leases, or other similar leases in lieu thereof, subsequent to the time when the court shall have adjudged said Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof?

(h) That continuous litigation, involving title to and possession of leases covering the lands involved, the execution by the Respondent lessors of new leases to parties other than the Petitioner, and the filing of those new leases of record, clouded the Petitioner's title to the leases covering the lands in issue and tolled the Kansas Statute of Limitations, even

if that statute properly should be held pertinent to the issues in this equity proceeding, because of the fact that said statute has never commenced to run against the Petitioner.

(II) Questions of Departures from the Accepted and Usual Course of Judicial Proceedings Presented.

(1) Did the Circuit Court err in finding and holding:

(a) That the action of the United States District Court for the District of Kansas, in refusing to permit the Petitioner to amend his complaint should be affirmed? (R. 61-65.)

(b) That said District Court's final judgment and decree dismissing the complaint of the Petitioner should be affirmed, notwithstanding the fact that said District Court, in violation of the applicable law and Court Rules, required the Petitioner to furnish a list of assignees of interests in the escrow agreement applicable to the lands here involved, after said District Court had ceased to have jurisdiction over the cause of action? (R. 61-65.)

(c) That it was justified in rendering its opinion and entering its order, in said Case No. 2142 before the supplemental transcript of the record of the District Court proceeding could even be ordered by the Petitioner, or printed under the supervision of the Clerk of the Circuit Court; and in having said order of said Circuit Court signed by only two Justices, only one of whom sat in the case at the time when it was heard? (R. 77, 78.)

(III) Questions of Fact Presented.

(1) Did the Circuit Court err in finding and holding:

(a) That: "The only excuse offered by plaintiff for his inordinate delay in instituting his action is that the acts of defendants and the bank in refusing to deliver the leases, and pending litigation, have prevented him from carrying out the agreement to drill a well"? (R. 64.)

(b) That: "Nothing appearing in the record indicates that there was anything in the pending litigation preventing plaintiff from either proceeding with the completion of the well or from asserting his rights to the leases in any court of competent jurisdiction"? (R. 10, 11, 12, 64.)

(c) That: "There was, therefore, a period of eight years when apparently no litigation was pending"? (R. 9, 10, 11, 12, 23, 64.)

(d) That the Petitioner stood by, that Court decides, for more than fourteen years without asserting a claim to the property involved; and, that Petitioner's conduct in sitting by, that Court decides, for more than fourteen years effectively estops him from asserting any claim to this property at this late hour? (R. 9, 10, 11, 12, 13, 23, 64.)

(e) That: "The leases were five year leases, providing by their terms that they were to expire five years from date unless oil and gas was then being produced on the premises"? (R. 62.)

(f) That: "The original leases have expired by their own limitations. Other leases have been given to other parties who have developed the premises and brought in production"? (R. 64.)

(g) That: "Fourteen years have passed since plaintiff spudded in his well and claims to have been entitled to the possession of these leases. During all these years plaintiff stood by and did nothing to enforce the claim which he now asserts"? (R. 9, 10, 11, 12, 13, 23, 64.)

(2) Did the Circuit Court err in failing to find and hold:

(a) That, at no time, has the Petitioner been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property involved; also, that the two years' extension of the escrow agreement granted by the Respondent lessors to the Petitioner's predecessors in interest provides that the Petitioner "agrees to undertake the completing of said leasing of said block and if successful, agrees to commence a test well on said block within the time herein provided"? (R. 21, Ex. D.)

(b) That the Petitioner "has at all times since the execution of the oil and gas leases involved, and the entering into of said escrow agreement, been ready, able and willing to carry out all of the provisions of said leases and said escrow agreement by drilling a well on said premises or some portion thereof as provided by said escrow agreement, but has been prevented from so doing by the acts and conduct of said Respondent lessors"? (R. 12, 13.)

(c) That: "In absolute violation of the escrow agreement and the oil and gas leases executed by said lessors, the said escrow bank returned all of said oil and gas leases to the said defendants, and refused to deliver said oil and gas leases to the plaintiff, or his agents, after due demand"? (R. 11.)

(d) That the reasons why the oil and gas well, which was spudded in and drilled by the Petitioner to a depth of 600

feet on the property involved, was never completed, was the refusal of the escrow bank Respondent to deliver to the Petitioner the leases held in escrow by it, continuous litigation the pendency of which clouded the Petitioner's title, and delivery of top-leases by the lessor Respondents to other parties, thus clouding the Petitioner's title to the property? (R. 10, 11, 12, 13, 14.)

(e) That the Respondents had actual notice of the Petitioner's claim and title to the property involved, and had a demand for delivery of the leases covering said property; that the escrow agreement and the assignment thereof to the Petitioner were recorded, thereby providing constructive notice to the Respondents of the Petitioner's claim and title; and that the Petitioner has at all times fulfilled his obligations under the agreement imposed upon him, and has stood ready, willing and able to complete the oil and gas well according to the terms of the same? (R. 9, 10, 11, 12, 13, 20, 21, 22, Ex. B, Ex. C, Ex. D.)

(f) That: "The said defendant, M. K. Mathews, Cashier of the Bunker Hill State Bank, entered into an agreement and conspiracy with the lessor defendants * * * to defeat the rights of this plaintiff in and to said properties, although this plaintiff had complied in every particular with the escrow agreement and the extension agreement, and had expended large sums of money in the procuring of said leases, the assembling of the block and work necessary to the location of the structure, upon said premises described in said leases, which would be suitable for the drilling of a well for oil and gas purposes, and relying upon said escrow agreement and the provisions of said leases so placed in escrow, and the representations made by said bank through its agents, servants and employees and the lessors, did expend large sums of money looking to the benefit and the ultimate results which would inure to the lessors executing said leases; but that the said bank and the said defendants last above named and lessors, destroyed all of said leases, therefore a lease with the signatures could not be attached to the complaint * * * because all of said leases are in the possession of said defendants last above named, and cannot be obtained by the plaintiff after due diligence, inquiry and search?" (R. 11, 12.)

(g) That all of the Respondent lessors, by and through said Mathews and other parties, executed oil and gas leases upon all the properties here involved; that said property has been continuously under top leases to parties other than the Petitioner since the provisions of said escrow agreement were violated by said Respondents; and that, thereby, said Re-

spondents clouded the title of the Petitioner in and to said oil and gas leasehold estate, and prevented him from completing drilling operations upon said properties? (R. 12.)

(h) That the complaint prays that a receiver shall be appointed to take charge of and operate the properties here involved, to produce the oil therefrom, to market the same subject to the orders of the court, and that Respondents who have heretofore produced oil and gas from said properties be required to account for the same. (R. 15, 16.)

(D) REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(I) The Circuit Court Has Rendered an Erroneous Decision, Contrary To, and in Conflict With, Decisions of Other Circuit Courts, and of this Honorable Court, on the Same Matter.

The decision of the Circuit Court (R. 61-65) and its orders (R. 65, 86), here under review, are contrary to, and in conflict with, decisions of other Circuit Courts, and of this Honorable Court on the same matter; and this petition of the Petitioner requesting issuance by this Honorable Court of a writ of certiorari to the United States Circuit Court of Appeals, Tenth Circuit, should be allowed for the reasons summarized and commented upon briefly below, which are dealt with in more detail, in the attached brief in support of this petition for a writ of certiorari:

(a) It is true that the facts of record in this equitable proceeding require application of the principles of equitable estoppel. But the Circuit Court has misconceived, or ignored those principles, it has erred in that it has not applied correct principles to the facts of record here, and it has "gotten the wrong sow by an ear", when it holds that equitable estoppel should be applied against the Petitioner, instead of against the Respondents.

Under prior decisions of other Circuit Courts, and of this Honorable Court, on the same matter, the Petitioner's conduct does not operate to estop him, in equity, from assert-

ing, successfully, his claim and title to the leases covering the lands here involved, or his right to any of the other relief for which he has prayed, because both his blameless conduct and the censurable conduct of the Respondents have tolled commencement and running of equitable estoppel against the Petitioner, which has never attached to or begun to run against him. Equitable estoppel attaches to the Respondents, not to the Petitioner, under the facts of record here.

The Circuit Court finds and holds, in substance, that the judgment of the District Court should be affirmed for the reasons that the Petitioner is estopped, in equity, it decides, from successfully enforcing his claim and title to the lands involved, on the grounds that he has been guilty, it decides, of laches and speculative delay. (R. 61-65)

The decision of the Circuit Court is erroneous, in the light of the facts of record, because it is contrary to, and in conflict with, the decisions of other Circuit Courts, and of this Honorable Court, among which are the decisions in the cases cited below:

Oklahoma v. *Texas*, 268 U. S. 252.
Crary v. *Dye*, 208 U. S. 515.
Hobbs v. *McLean*, 117 U. S. 567.
Steel v. *St. Louis Smelting Co.*, 106 U. S. 447.
Brant v. *Coal Co.*, 93 U. S. 326.
Henshaw v. *Bissell*, 85 U. S. 255.
Standard Oil Co. v. *U. S.*, 107 F. (2d) 402.
(Circuit Court, Ninth Circuit; 1939, 1940.)
U. S. v. *Georgia*, 106 F. (2d) 955.
(Circuit Court, Fifth Circuit; 1939.)
National City Bank v. *Euclid Loan Co.*, 104 F. (2d) 712. (Circuit Court, Sixth Circuit; 1939.)
Branham v. *Johnson*, 85 F. (2d) 807.
(Circuit Court, District of Columbia; 1936.)
Jones v. *Winchester Repeating Arms Co.*, 61 F. (2d) 774. (Circuit Court, Second Circuit; 1932.)
Lamborn v. *Hardy*, 1 F. (2d) 679.
(Circuit Court, Sixth Circuit; 1924.)

Hamilton v. *Empire Gas & Fuel Co.*, 297 F. 422.
(Circuit Court, Eighth Circuit; 1924.)
U. S. v. *Wilson & Co.*, 214 F. 630.
(Circuit Court, Arkansas Circuit; 1914.)
Boyd v. *Northern Pacific Ry. Co.*, 170 F. 479.
(Circuit Court, Washington Circuit; 1906.)
Ulman v. *Clark*, 75 F. 868.
(Circuit Court, West Virginia Circuit; 1896.)

The decisions cited above, and numerous other decisions, will be analyzed and commented upon, in more detail, in the attached brief in support of this petition for a writ of certiorari, where the text-books and encyclopedias and the decisions referred to by them, will be examined on the subject of equitable estoppel. In that brief, the essential elements of the principles of equitable estoppel will be enumerated. Such an enumeration will be dispensed with here, in order to avoid repetition and to conserve space.

It should suffice here to cite, in addition to the decisions adverted to above, the following text-books and encyclopedias, and the decisions covered therein, upon the subject of equitable estoppel:

Bispham's Principles of Equity, Tenth Edition, Sec. 282, pp. 480, 481, *et seq.*, including pp. 490 and 491.
Bigelow on Estoppel, Fifth Edition, p. 570, *et seq.*
Bigelow on Estoppel, Sixth Edition, p. 602, *et seq.*
21 *Corpus Juris*, p. 1113, *et seq.*, including particularly pp. 1120, 1121, 1123, 1126, 1129, 1131, 1138, 1139, 1152, 1153, 1155, 1156, 1160 and 1164.

The Circuit Court has misconceived, or ignored, the essential elements of the principles of equitable estoppel, and it has erred in applying those essential elements to the facts of record in this proceeding, when it holds that equitable estoppel should be applied against the Petitioner, because essential elements to justify application of equitable estoppel are lacking in the Petitioner's conduct, as disclosed by the record, in the light of the decisions, for the following

succinctly stated reasons, among others (R. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23):

First: The Petitioner's conduct has not been lacking in good faith; nor has he been guilty of any gross negligence which can amount to constructive fraud.

Second: The Petitioner has not been remiss in serving both actual and constructive record notice upon the Respondents of his claims and title to the lands involved.

Third: There has not been any concealment from the Respondents of any material facts by the Petitioner.

Fourth: The Respondents have not been ignorant, either actually or permissibly, of the truth as to the Petitioner's claim or title to the lands in question; nor have they been destitute of knowledge of the true state of the Petitioner's title.

Fifth: In the face of complete actual and constructive record knowledge of the Petitioner's claims and title to said lands, the Respondents have acted in such a manner as to attempt to challenge and override the Petitioner's rights.

Sixth: The Petitioner has never intended that the Respondents should act upon a false representation made by him, or upon a concealment of a material fact by him; and the Respondents have not been induced to act upon any such conduct of the Petitioner.

Seventh: The Respondents, by their wrongful conduct in refusing to deliver the escrow leases to the Petitioner, after he had fulfilled all conditions precedent to such delivery, and in entering into a conspiracy to defraud the Petitioner, have deliberately and with complete knowledge, clouded the claim and title of the Petitioner to the lands in issue, thereby tolling the application of equitable estoppel against the Petitioner.

Eighth: The Respondents' acts have been the result of their own will and judgment, as they had complete knowledge of the Petitioner's claims and title to said property, rather than the product of what the Petitioner has done or represented, either affirmatively or by silence.

Ninth: No conduct, or silence, of the Petitioner has been the immediate or proximate cause of acts by the Respondents.

Tenth: The Respondents have not acted in good faith, and do not, with "clean hands", invoke in this proceeding, equitable estoppel against the Petitioner; on the contrary, they have conspired to deprive the Petitioner of his lawful claim and title to said lands.

Eleventh: Continuous litigation, challenging the Petitioner's claim and title to said lands, has tolled the application of equitable estoppel against the Petitioner.

Twelfth: The placing by the Respondents, and the recording, of top-leases running to parties other than the Petitioner upon the lands here in issue have wrongfully clouded the Petitioner's claim and title thereto, thereby tolling the application of equitable estoppel against the Petitioner.

Thirteenth: At all times, complete facts as to the condition of the Petitioner's claim and title to said lands have been known to the Respondents, as well as to the Petitioner, and both have had the same means of ascertaining the truth; therefore, no estoppel can lie against the Petitioner.

Fourteenth: Inasmuch as the Respondents' wrongful conduct estops them from successfully pleading equitable estoppel against the Petitioner, even if equitable estoppel would otherwise lie against the Petitioner which is not a fact, the matter would be set at large, because one estoppel would cancel the other. (In addition to R. references, *supra*, see 21 *Corpus Juris*, p. 1139, and cases there cited.)

Fifteenth: No conduct of the Petitioner, which can be relied upon by the Respondents to raise equitable estoppel, occurred *concurrently with, or anterior to,* the action on the part of the Respondents which that conduct of the Petitioner is claimed to have influenced.

Sixteenth: The Petitioner has not, without vigorously voicing his objection, suffered the Respondents to make improvements or expenditures on the lands involved; on the contrary, he has strenuously objected thereto and has served both actual and record notice of his claim and title to said lands upon the Respondents; therefore, the doctrine of speculative delay, in connection with equitable estoppel, does not apply here.

Seventeenth: No obligation has devolved, at any time, either in law or in equity, upon the Petitioner to institute court proceedings in order to *assert* his claim to and title in the lands here involved. His conduct has asserted that claim sufficiently. (*Bispham's Pinciples of Equity, Tenth Edition,* Sec. 282; *Bigelow on Estoppel, Fifth Edition,* p. 570, *et seq.,* and *Sixth Edition,* p. 602, *et seq.;* 21 *Corpus Juris,* p. 1113, *et seq.,* including particularly pp. 1120, 1121, 1123, 1129, 1131, 1132, 1138, 1139, 1152, 1153, 1155, 1156, 1160 and 1164; *Oklahoma* v. *Texas,* 268 U. S. 252; *Crary* v. *Dye,* 208 U. S. 515; *Hobbs* v. *McLean,* 117 U. S. 567; *Steel* v. *St. Louis Smelting Co.,* 106 U. S. 447; *Brant* v. *Coal Co.,* 93 U. S. 326; *Henshaw* v. *Bissell,* 85 U. S. 255; *Standard Oil Co.* v. *U. S.,* 107 F. (2d) 402; *U. S.* v. *Georgia,* 106 F. (2d) 955; *National City Bank* v. *Euclid Loan Co.,* 104 F. (2d) 712; *Branham* v. *Johnson,* 85 F. (2d) 807; *Lamborn* v. *Hardy,* 1 F. (2d) 679; *Hamilton* v. *Empire Gas & Fuel Co.,* 297 F. 422; *U. S.* v. *Wilson & Co.,* 214 F. 630; *Boyd* v. *Northern Pacific Ry. Co.,* 170 F. 479; *Ulman* v. *Clark,* 75 F. 868.)

Eighteenth: It is immaterial whether or not the character of the continuous litigation clouding the Petitioner's claim and title to said lands was such as to prevent the Petitioner from asserting his rights by a *court proceeding,*

since, as has been demonstrated in *Seventeenth* above, no obligation has devolved at any time upon the Petitioner to institute *court proceedings* in order to *assert* his claim to and title in the lands in issue.

It is submitted that, in the light of what has been said above, equitable estoppel attaches to the Respondents, not to the Petitioner; and that the Circuit Court has rendered an erroneous decision, contrary to, and in conflict with, decisions of other Circuit Courts, and of this Honorable Court, on the same matter.

(b) Under and by virtue of the escrow agreement, the extension agreement, and the leases, the escrow bank was bound and compelled, as a matter of law and equity, as soon as the Petitioner erected a derrick, placed machinery, and spudded in a test well, to deliver to the Petitioner the leases covering the lands involved, which were held in escrow by that bank; and the Petitioner immediately acquired a vested interest in said lands covered by those leases.

The Circuit Court, erroneously, has ignored, in its decision, the foregoing contentions of the Petitioner, contrary to, and in conflict with the decisions of other Circuit Courts, and of this Honorable Court, cited below:

Black v. *Elkhorn Mining Co.*, 49 F. 549; 163 U. S. 445.
Francis v. *Superior Oil Co.*, 102 F. (2d) 732.
Commissioner of Internal Revenue v. *McKinney*, 87 F. (2d) 811.
Gray v. *Cornelius*, 40 F. (2d) 67.
Ladd v. *Foster Investment Co.*, 26 F. (2d) 698.
Empire Gas & Fuel Co. v. *Stearn*, 15 F. (2d) 323.
(See, also, General Statutes of Kansas, Annotated, 1935, Sections 33-105 and 33-106.)

The opinion of the Circuit Court in this cause correctly finds and holds (R. 62) that "a well was spudded in while the escrow agreement was in full force". The provisions of the escrow agreement (R. 20), and of the extension thereof (R. 21), bind the escrow bank to deliver the escrow

leases to the Petitioner as soon as the Petitioner erected a derrick, placed machinery, and spudded in a test well. It follows, therefore, that the bank was bound and compelled, as a matter of law and equity, under the facts of the case, as found and held by the Circuit Court in its opinion, to deliver to the Petitioner the leases covering the lands involved which were held in escrow by that bank.

(c) The leases placed in escrow with the escrow bank, the assignments of which are held by the Petitioner, are superior to all other claims to the lands involved; all of the leases held by the Respondents are by them held in trust as trustees for the Petitioner; and the Petitioner has at all times complied, insofar as he has been permitted to do so by the Respondents, with the escrow agreement, the extension agreement, and the provisions of the leases covering the lands in issue. Therefore, by virtue of the assignments to him, the Petitioner has equitable ownership of all of said leases.

The Circuit Court failed to endorse the foregoing contentions of the Petitioner. Its decision is erroneous because it is contrary to, and in conflict with, the decision of this Honorable Court in *Citizens National Bank* v. *Davisson*, 229 U. S. 212.

It has been demonstrated above, that the escrow bank refused to comply with its duty, under the law and equity, when it refused to deliver to the Petitioner the leases covering the lands involved which were held in escrow by that bank. It follows, therefore, that an equitable trust was created, and that said leases are held by the Respondents in trust as trustee for the Petitioner. The Circuit Court finds and holds "that a well was spudded in while the escrow agreement was in full force" (R. 62), "that the bank refused to deliver the leases to plaintiff (Petitioner) but returned them to the landowners who thereafter gave leases to other parties" (R. 62), and "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well". (R. 62)

These findings of the Circuit Court are correct as they are based squarely upon the facts of record. (R. 10, 12, 13) Inasmuch as the Petitioner has not been estopped in equity, as has been demonstrated hereinabove, from successfully maintaining his claim to the property in issue, it follows that, by virtue of the assignment (R. 20) of the escrow agreement to him the Petitioner has equitable ownership of all said leases.

(d) By reason of the wrongful acts and doings of the Respondent escrow bank, of the Respondent lessors, and of the Respondent top-lessees, said Respondents are estopped, in equity, from denying that the Petitioner is the equitable owner of said leases.

The record shows (R. 8-21) that by reason of the wrongful acts and doings of the Respondent bank, of the Respondent lessors, and of the Respondent top-lessees, the Petitioner has been prevented from completing fulfillment of his obligations under the escrow agreement and the escrow leases. (R. 10, 12, 13) The Circuit Court, in its opinion, found and held "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well". (R. 62) It follows, from the foregoing facts, that the Respondents are estopped, in equity, from denying that the Petitioner is the equitable owner of said leases.

(e) The Respondents are estopped from claiming that said leases are not now in full force and effect, because, by reason of the acts and conduct of said Respondents, the Petitioner was prevented from performing his agreement and is relieved therefrom until the said lessors and escrow bank shall have performed on their part the obligations imposed upon them.

The Circuit Court, in its opinion, found and held "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well" (R. 62), which finding is substantiated by the facts of record. (R. 10, 12, 13) Under the circumstances, the

Respondents are estopped from claiming, successfully, that said leases are not now in full force and effect, because, by reason of the acts and conduct of said Respondents, the Petitioner was prevented from performing his agreement, and was relieved therefrom until the said Respondent lessors and escrow bank shall have performed on their part the obligations imposed upon them.

(f) The Respondents are estopped from denying that the Petitioner is now entitled to have the full time provided for in said leases for the performance of all obligations devolving upon him, after the delivery to him of said leases, or other similar leases, subsequent to the time when the Court shall have adjudged the Petitioner to be the equitable owner of said leases and to be entitled to delivery thereof.

Since the Circuit Court has held and found "that the action of the landowners and the escrow agent has prevented plaintiff (Petitioner) from completing the test well" (R. 62), which facts are substantiated by the facts of record (R. 13), it follows, inescapably, that the contentions outlined in the last preceding paragraph must be upheld.

(g) Even if the Kansas Statute of Limitations properly should be held pertinent to the issues in this equity proceeding, that Statute has been tolled and has never commenced to run, because the Respondents have had both actual and constructive record notice of the claims and rights of the Petitioner, and the landowner Respondents have placed a cloud on the Petitioner's title to the properties involved by their conduct in executing top leases, which have been recorded, which cloud they never have removed.

The Circuit Court, erroneously, has ignored, in its decision, the foregoing contentions of the Petitioner, contrary to, and in conflict with, the decisions of other Circuit Courts, and of this Honorable Court, cited below:

U. S. v. *Wiley*, 78 U. S. 508.
Hamilton v. *Empire Gas & Fuel Co.*, 297 F. 422.

Blodgett v. *Lanyon Zinc Co.*, 120 F. 893.
(See, also, *Hutchinson* v. *Hutchinson*, 92 Kan. 518; *Weaver Mining Co.* v. *Guthrie*, 189 Mo. App. 108; *Hudspeth* v. *Schmelzer*, 182 Okla. 416; *Stahl* v. *VanVleck*, 53 Ohio St. 136; *Simons* v. *McDaniel*, 154 Okla. 168, and long line of other state cases listed therein.)

The record discloses (R. 10, 11) the fact that the escrow-bank brought suit on April 2, 1924 to cancel the escrow agreement and the leases deposited thereunder, before the expiration of the date before which the Petitioner had to spud in his well, and that the escrow-bank's suit, after having been transferred from the Kansas Court to the United States District Court, was finally dismissed on June 22, 1926. The record discloses, also, that "at various times some portion of the leasehold estate to the property involved herein has been in litigation, and *continuous litigation*, since about April 2, 1924". (R. 12) The case of *Taylor* v. *Focks Drilling and Manufacturing Corporation*, involving the properties here in issue, was decided finally by the United States District Court on December 12, 1936. The record shows, moreover, that: "The last suit involving any portion of the properties herein described was dismissed in the Supreme Court of the State of Kansas in the month of July, 1938". (R. 12)

Although all of the proceedings comprising "continuous litigation" involving the properties in issue are not recited by the Petitioner in his complaint, the complaint states that the "plaintiff (Petitioner) at the proper time will make proof thereof". (R. 11) And if the Petitioner had been permitted by the District Court, or by the Circuit Court, to amend his complaint, in accordance with the petition filed in his behalf in the District Court requesting that permission, the allegations in the complaint relative to "continuous litigation" would have been elaborated, and the proceedings comprising that "continuous litigation" would have been listed and commented upon by the Petitioner

with more particularity. The offer to do all these things, also, to submit comprehensive evidence with respect to said continuous litigation, made by the Petitioner, still stands.

The properties here involved were top-leased by the Respondent landowners, and have been continuously under such top-leases since the escrow-bank and those owners unlawfully and inequitably flouted the rights of the Petitioner by refusing to deliver the escrow-leases to him. Many of these top-leases were consummated before the expiration of the time which the Petitioner had, under the terms of the escrow agreement, and of the extension thereof, to complete his obligations, as the condition precedent to delivery of the said leases to him by the escrow-bank.

Under the great weight of the pertinent decisions, cited *supra*, the continuous litigation and the top leasing, or either of them, stopped and prevented the running of any statute of limitations; also, the wrongful conduct of the Respondents estops them from pleading any statute of limitations against the Petitioner.

(II) The Circuit Court Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, and Has So Far Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of Supervision by this Honorable Court.

There are three respects in which the Circuit Court, in this cause, has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of supervision by this Honorable Court.

They are:

(1) The Circuit Court erred in finding and holding that the action of the United States District Court for the District of Kansas, in refusing to permit the Petitioner to amend his complaint in this cause, should be affirmed. (R. 61-65)

(2) The Circuit Court erred in confirming said District Court's final judgment and decree dismissing the complaint of the Petitioner in Case No. 2142, supra, notwithstanding the fact that said District Court, in violation of the applicable law and of the Court Rules, required the Petitioner to furnish a list of assignees of interest in the escrow agreement applicable to the lands here involved, after said District Court had ceased to have jurisdiction over the cause of action. (R. 61-65)

(3) The Circuit Court erred in finding and holding that it was justified in rendering its opinion and entering its order in Case No. 2142, supra, before the supplemental transcript of the record of the District Court proceeding could even be ordered by the Petitioner, or printed under the supervision of the Clerk of the Circuit Court, and in having said order of said Circuit Court signed by only two justices, only one of whom sat in the case at the time when it was heard. (R. 77, 78)

As to the error of the Circuit Court in affirming the action of the District Court in refusing to permit the Petitioner to amend his complaint:

Rule 15 of the new Rules of Civil Procedure, governing the District Court and the Circuit Court, provides in part:

> "A party may amend his pleading once, as a matter of course, at any time before a responsive pleading is served * * * otherwise a party may amend his pleading only by leave of court, or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*" (Italics supplied)

This rule has been construed by several United States District Courts and Circuit Courts, and by this Honorable Court, in a great many cases, some of which are cited below:

> *Texarkana* v. *Gas Co.*, 306 U. S. 188-204.
> *Bessemer Investment Company* v. *City of Chester*, 113 F. (2d) 571.

Jones v. *Insurance Co.*, 108 F. 123.
Moore v. *Illinois Central Ry. Co.*, 24 Fed. Sup. 731.
Holland v. *Majestic Radio and Television Corporation et al*, 27 Fed. Sup. 990.
Fleitman v. *McKinnon*, 238 F. 98.
Insurance Company v. *Svendsen*, 74 F. 346.
Schindler v. *Spackman*, 16 F. (2d) 45.
Wilson v. *Lamberton, et al*, 102 F. (2d) 506.
See, also: *Metcalf* v. *Watertown*, 128 U. S. 590; *Everhart* v. *Huntsville College*, 120 U. S. 223; *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225; *Menard* v. *Goggan*, 121 U. S. 253.

The decisions in the above cited cases hold, in substance, that, under the new Rules of Civil Procedure, leave to amend pleadings should be granted with great liberality, in order that a plaintiff may not be deprived of his right to sue if he can allege a valid cause of action, and in order that his case may be tried upon its merits, without unreasonable delay, rather than dismissed on technicalities; and that United States courts should exercise their discretion liberally in permitting amendments to complaints, so as not to deprive a litigant of a chance to bring his case to trial, especially when the case has not been placed in issue, and no prejudice would result to the defendants, at the time permission to amend a complaint is sought, as are the facts here.

The court opinions cited above are dealt with in more detail in the argument contained in the Petitioner's attached brief filed in support of this petition for a writ of certiorari. The decision of the Circuit Court, here under review, is contrary to, and in conflict with them.

In regard to the error made by the Circuit Court in affirming the District Court's final judgment and decree dismissing the complaint of the Petitioner, notwithstanding the fact that the District Court, in violation of the applicable law and the Court Rules, required the Petitioner to furnish a list of assignees of interests in the escrow agreement applicable to the lands here involved, after said District Court

had ceased to have jurisdiction over the cause of action: On May 24, 1940, the Petitioner filed his notice of appeal to the Circuit Court of Appeals, in the office of the Clerk of the District Court, announcing that he appealed from the judgment of the District Court, entered on May 13, 1940, wherein that Court denied him the right to file an amended complaint and entered a final order dismissing his action; and the case was docketed in the Circuit Court as Case No. 2142, supra. (R. 57) On the same day, *but following the filing of said notice of appeal,* the District Court compelled the Petitioner to furnish a list of assignees of the escrow agreement, which was actually filed, under duress, on May 27, 1940. (R. 54-56)

The District Court, in fact, *no longer had jurisdiction of the case after the notice of appeal had been filed.* However, the record (R. 51) shows the following colloquy between the Court and counsel for Petitioner:

> "Mr. Martin: May I also inquire if it is the order of the Court that the Court still retains jurisdiction of this case?
>
> "The Court (Judge Hopkins): I retain jurisdiction for the purpose of this investigation, yes, sir."

Rule 73 of the new Rules of Civil Procedure, governing appeals to all United States Circuit Courts, provides the time and manner of taking an appeal to Circuit Courts, and specifies that a District Court is divested of jurisdiction after the notice of appeal to a Circuit Court is filed. That Rule states, in part:

> "When an appeal is permitted by law from a District Court to a Circuit Court of Appeals, and within the time prescribed, a party may appeal from a judgment by filing with the District Court a notice of appeal."

The record (R. 47-51) clearly indicates that District Court Judge Hopkins recognized that he had lost jurisdiction of the cause at the time he demanded a list of assignees

of interest in the escrow agreement; but that, notwithstanding this fact, he arbitrarily, capriciously, and erroneously presumed to retain jurisdiction for the sole purpose of securing this information, thereby overriding, in a high-handed and censurable manner, the Rules applicable to his court.

That arbitrary action taken by Judge Hopkins was unwarranted for the additional reason that the information exacted from the Petitioner then had, nor can it ever have, any remote pertinency to the issues in this cause which were then, or are now, at bar. It would seem, under the circumstances, that a presumption is permissible that Justice Hopkins resorted to a "fishing expedition" for the purpose of constraining the Petitioner to divulge information in regard to his private affairs which was desired by parties unknown to the Petitioner; all of which was done over the vigorous protest of counsel for the Petitioner, as the record amply demonstrates.

With respect to the Circuit Court's error in rendering its opinion and entering its order in Case No. 2142, *supra*, before the supplemental transcript of the record of the District Court proceeding could even be ordered by the Petitioner, or printed under the supervision of the Clerk of the Circuit Court, and its error in having its order signed by only two Justices, only one of whom sat in the case: It is submitted that the record discloses no justification for such "wedding-haste" on the part of the Circuit Court in rendering its opinion in Case No. 2142, *supra;* and that said action of the Circuit Court raises a serious presumption that the issues at bar in Case No. 2142, *supra*, were not properly before the Justices of the Circuit Court, and did not receive all of the consideration to which they are entitled before that Court's opinion was rendered and its order was entered.

(III) The Circuit Court Has Misinterpreted, or Ignored, Salient and Controlling Facts of Record, Admitted by the Respondents.

The decision (R. 61-65) and orders (R. 65, 86) of the Circuit Court, here under review, have misinterpreted or ignored salient and controlling facts of record, admitted by the respondents; and this petition of the Petitioner, requesting issuance by this Honorable Court of a writ of certiorari should be allowed for the reasons summarized and commented upon briefly below, which are dealt with, in more detail, in the annexed brief in support of this petition:

(a) The Petitioner does not justify his failure to institute a court action to assert his rights solely upon the ground of refusal of the escrow bank to deliver the leases to him, and the ground of pending litigation, as the Circuit Court erroneously finds. (R. 64)

(b) Continuous litigation involving the leases was of such a nature as to prevent the Petitioner from safely proceeding to develop the lands involved under the terms of the escrow agreement. (R. 10, 11, 12, 64)

(c) The Circuit Court erroneously found that a period of eight years has elapsed when no litigation was pending. (R. 9, 10, 11, 12, 23, 64)

(d) The Petitioner did not sit by for more than fourteen years without asserting a claim to the property involved, as the Circuit Court erroneously finds. (R. 9, 10, 11, 12, 13, 23, 64)

(e) The Circuit Court incompletely recited the terms and conditions of the leases as to the extent of their duration, when it held that: "The leases were five year leases, providing by their terms that they were to expire five years from date, unless oil and gas was then being produced on the premises." (R. 62)

(f) It is misleading to find, as the Circuit Court has erroneously done, that: "The original leases have expired by

their own limitations. Other leases have been given to other parties who have developed the premises and brought in production." (R. 64)

(g) At no time has the Petitioner been remiss in complying with his contractual obligations relative to the drilling of an oil and gas well upon the property in issue. (R. 21, Ex. D)

(h) The Petitioner has at all times since the execution of the leases involved, and the entering into of said escrow-agreement, been ready, able and willing to comply with the provisions thereof, but has been prevented from so doing by the acts and conduct of the Respondents. (R. 12, 13)

(i) In violation of the escrow-agreement and the escrow-leases, the escrow-bank returned all of said escrow-leases to the Respondent lessors and refused to deliver said leases to the Petitioner, after due demand. (R. 11, 12)

(j) The reasons why the oil and gas well, which was spudded in and drilled by the Petitioner to a depth of 600 feet on the property involved, was never completed, were refusal of the escrow-bank Respondent to deliver to the Petitioner the leases held in escrow by it, and "continuous litigation" the pendency of which clouded the Petitioner's title, also, execution and delivery of top-leases by lessor Respondents to other parties, thus clouding Petitioner's title to the property. (R. 10, 11, 12, 13, 14)

(k) Respondents had actual notice of Petitioner's claim and title to the property involved, and had a demand for delivery of the leases covering said property; the escrow-agreement and the assignment thereof to the Petitioner were recorded, thereby providing constructive notice to Respondents of Petitioner's claim and title; the Petitioner has at all times fulfilled all his obligations, however arising; and has stood ready, willing and able to complete the oil and gas well in accordance with the terms of the escrow-

agreement. (R. 9, 10, 11, 12, 13, 20, 21, 22, Ex. B., Ex C., Ex. D)

(l) Respondent, M. K. Mathews, Cashier of the Bunker Hill State Bank, entered into an agreement and conspiracy with the lesor Respondents to defeat the rights of the Petitioner to the properties involved; and said Mathews and the Respondent lessors destroyed said leases. (R. 11, 12)

(m) The Respondent lessors, by and through said Mathews, and other parties, executed oil and gas leases upon all the properties here involved; said property has been continuously under lease to parties other than the Petitioner since the provisions of said escrow-agreement were violated by Respondents; and, thereby, said Respondents have clouded the claim and title of the Petitioner to said property, and have prevented him from completing drilling operations upon it. (R. 12)

(n) The complaint prays that a receiver shall be appointed by the Court to take charge of, and to operate, said properties, to produce oil therefrom, to market the same subject to the order of the Court, and that the Respondents who have heretofore produced oil and gas from said properties shall be required to account for the same. (R. 15, 16)

(E) THE ANNEXED BRIEF, IN BEHALF OF THE PETITIONER, IN SUPPORT OF THIS PETITION FOR A WRIT OF CERTIORARI, BY REFERENCE IS INCORPORATED IN, AND MADE A PART OF, THIS PETITION.

The annexed brief, in behalf of the Petitioner, in support of this petition for a writ of certiorari, by reference is incorporated in, and made a part of, this petition; and the Petitioner respectfully requests that each and every statement, and conclusion of fact and of law, and argument, contained in said brief shall be considered by this Honorable Court as applying to and substantiating the summary statements and conclusions of fact and of law, embodied in this petition.

(F) PRAYER FOR RELIEF.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued, out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that Court to certify and to send to this Honorable Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, No. 2022, *Ben Preston, Appellant,* v. *Kaw Pipe Line Company, et al., Appellees,* and No. 2142, *Ben Preston, Appellant,* v. *Kaw Pipe Line Company, et al., Appellees;* that the said opinions, decrees, and judgments, of the said United States Circuit Court of Appeals, Tenth Circuit, be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

Respectfully submitted,

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November 8, 1940.